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# **Decision**

Matter of: Raytheon Company

**File:** B-409651; B-409651.2

**Date:** July 9, 2014

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Paul F. Khoury, Esq., Benjamin Kohr, Esq., and Samantha S. Lee, Esq., Wiley Rein LLP, for the intervenor.

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## **DIGEST**

Protest is sustained where the record shows that the agency's source selection decision lacks a rational basis, the agency unreasonably evaluated the awardee's proposal under the past performance factor, and there is a reasonable possibility that the protester was prejudiced by the agency's errors.

## **DECISION**

Raytheon Company, of Marlborough, Massachusetts, protests the award of a contract to EFW, Inc., of Fort Worth, Texas, by the Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), under request for proposals (RFP) No. HSBP1012R0024 for the acquisition and deployment of an integrated fixed towers (IFT) system in support of the agency's border enforcement efforts. Raytheon challenges the agency's evaluation of proposals under the operational utility, technical and past performance factors, as well as its best-value tradeoff decision.

We sustain the protest.

## INTRODUCTION

Raytheon argues that the agency unreasonably and unequally evaluated proposals with respect to the infrared camera systems proposed by itself and EFW. Raytheon also challenges as unreasonable the agency's consideration of EFW's videomotion-detection-while-scanning feature, and its "clutter reduction," as discriminators in EFW's favor. Finally, Raytheon argues that the agency improperly attributed the past performance of an affiliated company to EFW.

As discussed in more detail below, we conclude that the agency's evaluation of the relative merits of the infrared camera systems proposed by both EFW and Raytheon lacks a rational basis and evidences unequal treatment of offerors, and the assignment of a discriminator in favor of EFW for "clutter reduction" lacks support in the record. Additionally, the agency's evaluation of EFW's past performance was unreasonable in that the agency improperly attributed to EFW past performance of an affiliated company, where there is no evidence that the affiliated company will have any meaningful involvement in contract performance. We conclude that these errors, when combined, prejudiced Raytheon.

#### **BACKGROUND**

The RFP, issued April 6, 2012, anticipated the award of a fixed-price contract to a firm to provide a non-developmental (ideally commercial) sensor system that provides long range persistent surveillance to enable the detection, tracking, identification, and classification of items of interest in rural and remote areas along the nation's borders. RFP at 8. The solicitation provides for performance over a 1-year base period, with up to seven 1-year option periods. <u>Id.</u> at 25.

The RFP set forth the agency's desired capabilities in an IFT Capability Interest Matrix (ICIM). See generally RFP, attachment J-2A. The ICIM identified eight key mission elements, supported by operational capability interests (OCI) and subordinate functional capability interests (FCI). The OCIs were prioritized from key performance parameters (priority 1) to successively less important priorities. Id. DHS desired an IFT system that met or exceeded all listed OCIs but recognized that existing, non-developmental systems might not satisfy all parameters. RFP at 109.

For example, OCI 071 was identified as a priority 2 interest associated with the "Classify" mission element. RFP, attachment J-2A, at 12. The method of verification for this interest was identified as by "test" and "analysis." Id. at 4, 12. OCI 071 required the IFT system to provide video "of sufficient quality and resolution" to enable an operator to determine whether an item of interest is carrying

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<sup>&</sup>lt;sup>1</sup> Each OCI and FCI was associated with one of four methods of verification: test, analysis, demonstration or inspection. <u>See generally id.</u>

unconcealed long-arm weapons out to ranges of "1.0 miles (T)/3.0 miles (O)." <u>Id.</u> at 12. The Threshold (T) value indicates the least level of that capability generally contemplated, and the Objective (O) value indicates the desired level.

Proposals were to be evaluated on a best-value basis considering price and five non-price factors: operational utility, system maturity and deployment capability (SM&DC), technical, management, and past performance. RFP at 133-134. The equally-weighted operational utility and SM&DC factors were the most important factors. <u>Id.</u> at 133. The equally-weighted technical and management factors were slightly less important than operational utility and SM&DC. <u>Id.</u> Past performance was slightly less important than technical or management. <u>Id.</u> All non-price factors, when combined, were significantly more important than price, but the solicitation reserved the right to make price differences a significant element of the best-value determination. Id.

The RFP listed subfactors under the operational utility, technical and management factors. Relevant here are the operational utility factor's operational functionality and graphical user interface/ergonomics subfactors. The former measures the degree to which the proposed system's functionality provides "ease of use and responsiveness to carry out the IFT mission," and the latter measures the degree to which the proposed graphical user interface/ergonomics of the workstation maximizes the user's efficient performance. <u>Id.</u> at 135. Also relevant is the technical factor's identification capability subfactor, which measures the capability to determine "what the detected entity is (human, animal, conveyance, unknown)." <u>Id.</u>

Offerors were to substantiate system performance claims in their proposals, and the agency would consider substantiating evidence in evaluating proposals. <u>Id.</u> at 138. For offerors in the competitive range, DHS stated that it would consider SM&DC demonstrations (SM&DCD) as substantiating evidence for the operational utility, SM&DC, technical and management factors. <u>Id.</u> Examples of substantiating evidence were identified as the SM&DCD; tests performed and resulting data on integrated systems across a range of environments; independent test results; and analysis combined with test results. <u>Id.</u> The SM&DCD might become the most important of all substantiating evidence. <u>Id.</u>

Fourteen proposals were received in response to the solicitation. After an initial evaluation, the agency established a competitive range of seven offerors, including EFW and Raytheon. AR, exh. J1, Source Selection Decision, at 5. Each of these offerors provided a SM&DCD, participated in discussions, and submitted final proposals. Id. The technical evaluation teams (TET) prepared detailed consensus reports describing all of the strengths, weaknesses, and risks of the proposals. The source selection evaluation board (SSEB) reviewed these reports and conducted a detailed comparative analysis of the proposals. Our focus is on the comparison between the evaluated features of the EFW and Raytheon proposals.

The evaluation results for EFW and Raytheon were as follows:

|                     | EFW           | Raytheon            |
|---------------------|---------------|---------------------|
| Operational Utility | Superior      | Good                |
| SM&DC               | Good          | Good                |
| Technical           | Good          | Good                |
| Management          | Good          | Good                |
| Past Performance    | Satisfactory  | Satisfactory        |
| Price (rounded)     | \$145 million | \$[DELETED] million |

Id. at 5.2

In its comparative analysis, the SSEB discussed unique elements of value in the proposals. For EFW, the SSEB listed [DELETED] strengths in descending order of value.<sup>3</sup> Among these were two exceptional strengths--one under the operational utility factor and one under the technical factor--for the firm's proposal of a camera package that included a [DELETED] feature. AR, exh. I10, SSEB Comparative Analysis Report, at 125-129. For Raytheon, the SSEB listed [DELETED] strengths in descending order of value, including an exceptional strength under the technical factor for its high-resolution camera. Id. at 138-141. The SSEB also reviewed unique risk and weakness elements in the proposals. The SSEB found that EFW's weaknesses and single risk did not significantly detract from the overall value of its proposal. Id. at 141. In contrast, the SSEB found that Raytheon's two [DELETED] risks did detract from the proposal's value. Id. at 143. Finally, the SSEB discussed similar, comparable, and contrastable value elements of the proposals. The SSEB found most elements of comparable value. <u>Id.</u> at 129. However, the SSEB found greater value in EFW's video detection/tracking, [DELETED]. Id. at 130-138. The SSEB found greater value in one area of Raytheon's proposal, [DELETED]. Id. at 132-133.

The SSEB concluded that, in totality, EFW's proposal provided the greater value, particularly with respect to two operational utility subfactors--operational functionality and graphical user interface/ergonomics. Id. at 148. The SSEB

<sup>&</sup>lt;sup>2</sup> The two proposals were viewed as "tied" under the SM&DC and past performance factors. AR, exh. I10, SSEB Comparative Analysis Report, at 22-23, 72. Both proposals were rated good under the technical and management factors, but Raytheon was ranked higher under the technical factor, and EFW was ranked higher under the management factor. Id. at 27, 38. The prices of both firms were considered reasonable. Id. at 69-72.

<sup>&</sup>lt;sup>3</sup> Strengths could be categorized as significant, outstanding, or exceptional. AR, exh. C1, Source Selection Plan (SSP), at 26.

observed that, for Raytheon's solution to improve to the level of EFW's solution in operational utility would require [DELETED]. <u>Id.</u>

The source selection authority (SSA) reviewed the evaluation documentation, including the SSEB's comparative analysis. He concurred with the SSEB's findings and award recommendation. He stated that, "[p]ut simply, the Elbit<sup>4</sup> proposal is far superior to any others in the two evaluation factors (taken together) that are most important: Operational Utility and SM&DC. . . . While many of the other systems seemed effective, in all cases they would require either more work-and-attention from the Border Patrol Agents who would operate them, or they required additional development and integration before they would provide a comparable level of performance and completeness to Elbit's solution." AR, exh. J1, Source Selection Decision, at 7-8. With respect to EFW and Raytheon, the SSA stated:

In terms of sheer quantity and value, Elbit has higher strengths than Raytheon. . . . Neither Elbit nor Raytheon has weaknesses or risks that are particularly significant to me in the overall scheme of this procurement. Nonetheless, the features of the Elbit proposal that enhance operational mission effectiveness persist, even as compared to the Raytheon proposal. To reiterate, the characteristics of the Elbit proposal that allow video motion detection even while a camera is moving, that enhance digital images so agents can have a better sense of whether an object is more or less likely to be a threat ([DELETED]), and that effectively reduce the amount of on-screen clutter an agent must absorb; have more than a merely arithmetic or even geometric effect on mission effectiveness. . . . Taken together, the tools offered by the Elbit system significantly decrease the demands on sensor operators, which in turn will increase the likelihood that all items of interest will be seen and tracked, and that front line patrol agents will more safely and effectively be able to interdict targets. The Raytheon proposal is a good and strong proposal--but the increased operational capability created by the Elbit system offers a better value, even at a [DELETED]% price premium.

Id. at 9. On this basis award was made to EFW, and this protest followed.

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<sup>&</sup>lt;sup>4</sup> The SSA referred to Elbit Systems of America, LLC as "Elbit." AR, exh. J1, Source Selection Decision, at 1. As discussed in more detail below, EFW is a wholly-owned subsidiary of Elbit Systems of America, LLC. Further, while EFW is the offeror, the proposal referred to "ESA" or "Elbit Systems of America" throughout its proposal. Likewise, the agency referred to EFW throughout the evaluation as either "Elbit," "ESA", or "Elbit Systems of America."

## DISCUSSION

Raytheon first argues that DHS unreasonably viewed as a unique strength and discriminator EFW's infrared (IR) camera [DELETED] feature. In a related argument, Raytheon argues that DHS engaged in unequal treatment in counting this feature as a strength for EFW under both the operational utility and the technical factors, while assigning Raytheon a strength for its high-resolution camera only under the technical factor. Raytheon also challenges as unreasonable the agency's consideration of EFW's video-motion-detection-while-scanning feature, and its clutter reduction, as discriminators in EFW's favor. Finally, Raytheon argues that the agency improperly attributed the past performance of an affiliated company to EFW. For the reasons discussed below, we sustain the protest.

## Identity of Offeror

As a threshold matter, Raytheon argues that EFW's proposal was ambiguous as to the identity of the offeror and, as a result, that the firm is ineligible for award. Raytheon asserts that EFW's proposal does not explain which Elbit entities will perform the contract and that EFW is not mentioned at all in the narrative of its relevant proposal volumes. Raytheon argues that these documents clearly portray "Elbit Systems of America" or "ESA," and not EFW, as the offeror.

We have held that uncertainty as to the identity of an offering entity renders an offer technically unacceptable, since ambiguity as to the offeror's identity could result in there being no party that is bound to perform the obligations of the contract. <u>Dick Enterprises, Inc.</u>, B-259686.2, June 21, 1995, 95-1 CPD ¶ 286 at 1. Generally, the entity awarded the contract should be the entity that submitted the initial proposal. <u>Townsend & Co.</u>, B-211762, Mar. 27, 1984, 84-1 CPD ¶ 352 at 4; <u>Pedestrian Bus Stop Shelters, Ltd.</u>, B-212570, Mar. 20, 1984, 84-1 CPD ¶ 331 at 3.

The agency contends that Raytheon's arguments in this area lack merit because EFW's proposal clearly stated, "Elbit Systems of America, LLC through its wholly owned subsidiary EFW Inc. (ESA) is pleased to provide its firm fixed price (FFP) proposal for the [IFT] system procurement." Legal Memorandum at 8. Further, the agency asserts that EFW consistently provided its own CAGE code and identified itself as the offeror where required. <u>Id.</u> We agree. While the record is unclear as to whom within ESA's family of companies will be performing the actual work under the contract, the proposal is clear that EFW, and not ESA, is the legal entity submitting the offer and the firm that will be bound in contract. For example, the

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<sup>&</sup>lt;sup>5</sup> The proposal identifies Elbit Systems of America and its subsidiaries, including EFW, Inc., collectively as "Elbit Systems of America." <u>See, e.g.,</u> AR, exh. F4, EFW Volume V - Past Performance, at cover page. As Raytheon notes, EFW's proposal identifies "Elbit Systems of America" or "ESA" as the entities performing the work.

Standard Form 33 submitted with the offer clearly identifies EFW, Inc. as the offering party. AR, exh. F1, Volume I, at 3-1. Thus, we conclude that there is no ambiguity as to the offering party, which is clearly EFW.

## EFW's [DELETED] Feature

Raytheon argues that the agency improperly determined that EFW's [DELETED] feature was a discriminator between the two proposals. In this regard, the protester argues that its proposed camera was of objectively higher quality, and that the agency unreasonably gave more credit to EFW's proposal for improving its lower-quality camera than it gave to Raytheon for proposing a higher-quality camera in the first place. Raytheon asserts that the underlying evaluation record contains no comparative discussions of the relative quality of EFW's and Raytheon's images and that, absent such an analysis, the agency unreasonably determined that EFW's [DELETED] feature was a unique benefit. Raytheon also challenges the agency's alleged overreliance on system demonstrations, arguing that the agency improperly ignored relevant technical data required by the solicitation. Finally, Raytheon asserts that the agency treated the offerors unequally by crediting EFW's camera solution under both the technical factor and the operational utility factor, while crediting Raytheon's camera solution under only the technical factor.

The evaluation of technical proposals is a matter within the discretion of the contracting agency, since the agency is responsible for defining its needs and the best method for accommodating them. SRA Int'l, Inc., B-408624, B-408624.2, Nov. 25, 2013, 2013 CPD ¶ 275 at 4. In reviewing an agency's evaluation, we will not reevaluate technical proposals, but instead will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and with procurement statutes and regulations. Id. However, in order to facilitate our examination, contracting agencies are required to adequately document their evaluation results, and sufficiently support the findings on which award determinations are made. Savvee Consulting, Inc., B-408416, B-408416.2, Sep. 18, 2013, 2013 CPD ¶ 231 at 7. As set forth in greater detail below, we conclude that the record fails to provide a reasonable basis to discriminate between EFW's and Raytheon's proposals on the basis of enhanced image quality, and that the record evidences unequal treatment of Raytheon's proposal.

The record shows that the TET assigned an exceptional strength to EFW's proposal under the operational functionality subfactor of the operational utility factor for "a camera package that includes [DELETED] feature that enhances the visibility of details in the IR image that helps facilitate the identification and classification of lols." AR, exh. G2, EFW Factor 1 Consensus, at 2; exh. G1, EFW Proposal Evaluation Report, at 2. The TET also assigned an exceptional strength to EFW's proposal under the identification capability subfactor of the technical factor for a "camera package that includes a [DELETED] feature that enhances the visibility of

details in the IR image." AR, exh. G4, EFW Factor 3 Consensus, at 16; exh. G1, EFW Proposal Evaluation Report, at 3.

In contrast, the TET assigned an exceptional strength to Raytheon's proposal under the identification capability subfactor of the technical factor for committing to provide a high-resolution IR camera, but did not recognize any of the firm's proposed image enhancement techniques under the technical factor, as it did with EFW. AR, exh. H4, Raytheon Factor 3 Consensus, at 18-19; exh. H1, Raytheon Proposal Evaluation Report, at 3. Raytheon's proposal also did not receive strengths under the operational utility factor for its high-resolution IR camera or its proposed image enhancement techniques. Instead, under the operational utility factor, the TET appears to have recognized the image enhancement techniques of Raytheon's proposed electro-optics (EO) and IR cameras only in the context of assigning a [DELETED] risk to Raytheon for lack of operator access to a robust set of [DELETED] for the EO and IR cameras. AR, exh. H2, Raytheon Factor 1 Consensus, at 8; exh. H1, Raytheon Proposal Evaluation Report.

In responding to Raytheon's contentions, DHS asserts that the SSEB recognized the strength of the firm's high-resolution IR camera, but that its comparative analysis found the strength to be offset by Raytheon's failure to propose operator access to [DELETED] for the camera. Legal Memorandum at 5, citing AR, exh. J4, SSEB Comparative Analysis Report, at 148. In this regard, the comparative analysis states:

Raytheon's proposal is assessed with an Exceptional Strength (RAYTHEON.3B.4) for committing to provide a high resolution ([DELETED]) infrared camera. However, Raytheon's proposal is assessed with a [DELETED] Risk (RAYTHEON.1A.1) because the Offeror has not clearly proposed to provide the operator access to a robust set of [DELETED] for the EO and IR cameras. . . . The Strength (RAYTHEON.3B.4) adds value and the [DELETED] Risk (RAYTHEON.1A.1) detracts from value.

Elbit's proposal is not assessed with a Strength similar to RAYTHEON.3B.4, and the Elbit proposal is not assessed with a Risk similar to RAYTHEON.1A.1. Considering the addition of value provided by [RAYTHEON.3.B.4], and the detractor from value represented by [RAYTHEON.1.A.1], the SSEB assesses the value presented by Elbit and Raytheon to be essentially equivalent in this respect.

AR, exh. I10, SSEB Comparison Analysis Report, at 148.

Raytheon responds arguing that there is no evidence in the record that lack of access to [DELETED] degrades the quality of Raytheon's camera image; nothing in

the record suggests that the risk makes EFW's camera image better than Raytheon's; and DHS overemphasizes the importance of the risk given the SSA's statement that neither firm had weakness or risks of particular significance to him. Protester Comments at 11-12 (citing AR, exh. J1, Source Selection Decision, at 9). Raytheon also argues that the risk assessed for lack of access to [DELETED] cannot offset the firm's camera superiority because Raytheon offered access to all [DELETED] in its FPR. Id. at 12.

We agree with DHS that Raytheon's challenge to the substance of the assessed risk is untimely as the firm knew that the risk was assessed at the time of its debriefing, but did not raise the issue in its intial protest, and only raised the matter in its comments. See 4 C.F.R. § 21.2(a)(2) (2014) (protests shall be filed not later than 10 days after the basis of protest is known or should have been known). However, we conclude that Raytheon has timely challenged the agency's use of the risk as an offset against the benefits offered by its IR camera. The record shows that the SSEB recognized that Raytheon proposed "[DELETED] image enhancement techniques" for its EO and IR cameras, which assist in cleaning up the images and increasing the operator's ability to identify and classify. AR, exh. H2, Raytheon Factor 1 Consensus, at 8. The SSEB also recognized that Raytheon did not clearly propose access to a robust set of [DELETED] for the cameras, but [DELETED].

On the record before us, the risk assigned to Raytheon's IR camera can be read as the risk posed by lack of access to [DELETED] outweighed the benefits of Raytheon's image enhancement techniques. Further, we understand the SSEB's comparative analysis to weigh the technical strength assigned for Raytheon's proposed high-resolution camera against the operational utility risk due to the perceived lack of access to robust [DELETED]. However, there is no reasonable explanation in the record as to why limiting access to [DELETED] not only outweighed the benefits of Raytheon's image enhancement techniques, but also served to offset any benefit offered by the firm's higher-resolution camera system.

<sup>&</sup>lt;sup>6</sup> In this regard, the SSEB noted that Raytheon's EO and IR cameras [DELETED]. AR, exh. H2, Raytheon Factor 1 Consensus, at 8-9.

<sup>&</sup>lt;sup>7</sup> The record conflicts as to whether Raytheon offered access to a robust set of [DELETED]. Raytheon states that it proposed access to [DELETED] in its FPR. Protester Comments at 12; AR, exh. E1, Raytheon Final Proposal Revision - Volume II, at II-2-34 to II-2-35. In supporting the risk, the SSEB refers to two observations made at Raytheon's SM&DCD. One observer witnessed the operator use "[DELETED]," and stated that, while "the vendor did display a [DELETED] . . . I didn't observe the features demonstrated." AR, exh. H2, Raytheon Factor 1 Consensus, at 8. Another observer stated, "[f]eatures such as [DELETED] not available to operator as configured." Id.

Additionally, although the agency offers the SSEB's comparative analysis as a response to Raytheon's arguments, the analysis provides no answer to Raytheon's contention that DHS improperly viewed EFW's proposed [DELETED] feature as a unique strength of its proposal—under both the operational utility and technical factors—for enhancing the visibility of details in IR images, and as an apparent unique feature serving as a discriminator. DHS's argument also does not address Raytheon's allegation of improper unequal treatment for treating EFW's [DELETED] feature as strengths under the operational utility and technical factors, while treating Raytheon's high-resolution camera as a strength only under the technical factor.

The agency contends that it reasonably assigned EFW's proposal a strength under the operational utility factor, not because of some general consideration of image quality, but because of the operational and functional capabilities of the system, which EFW committed to provide, and effectively demonstrated. Legal Memorandum at 5; Supp. Legal Memorandum at 2. The agency points to EFW's commitment under [DELETED]<sup>8</sup> and substantiating evidence presented at the demonstration, as supporting the assigned strength for EFW.<sup>9</sup> Id. at 2.

Raytheon first responds that the strength, on its face, does not relate to a commitment to an [DELETED], but to a broader statement of a perceived operational benefit of the [DELETED] feature. We agree.

The record shows that the SSEB's evaluation of EFW's [DELETED] feature under both factors relates to how the [DELETED] feature enhances the visibility of details in the IR image. Compare AR, exh. G2, EFW Factor 1 Consensus, at 2, 5; exh. G4, EFW Factor 3 Consensus, at 16. The source selection decision discusses the merits of EFW's proposal as "enhance[d] digital images so agents can have a better sense of whether an object is more or less likely to be a threat." AR, exh. J1, Source Selection Decision, at 9. In responding to this protest, the SSA discusses the [DELETED] feature in terms of "[a] sharp picture due to the [DELETED] that

<sup>&</sup>lt;sup>8</sup> [DELETED]. The evaluation record references EFW's commitment to satisfy the [DELETED] threshold, and references the substantiating evidence observed during the demonstration. AR, exh. G2, EFW Factor 1 Consensus, at 5-6.

<sup>&</sup>lt;sup>9</sup> The SSA explains, "[t]he [DELETED] did an outstanding job enhancing the IR camera and made it very easy for the operators to observe [DELETED]. Raytheon also received an Exceptional Strength for its high resolution IR Camera . . . . However, unlike the [DELETED] strength in Operational Utility, there were no specific observations or findings related to the Raytheon HD IR camera that showcased its ability to display an image clear enough to be able to identify [DELETED]." SSA Memorandum ¶ 27.

allows for better identification of [DELETED] and improves agent safety." <sup>10</sup> SSA Memorandum ¶ 17. The record thus shows that the strength relates to the agency's assessment of the enhanced image quality provided by EFW's [DELETED] feature and the benefits with respect to identification and classification, not simply to EFW's commitment under one [DELETED]. AR, exh. G2, EFW Factor 1 Consensus, at 5-6.

Raytheon next argues that the agency improperly relied on "limited anecdotal evidence" from the SM&DCD observations ignoring the required NVTherm data, <sup>11</sup> which showed that Raytheon's camera image was objectively superior to EFW's. Supp. Protester Comments at 6-13. The protester further challenges the reliability of the SM&DCD data, arguing that the subjective observations made are unreliable because there was no basis for the observers to compare the two systems and that Raytheon's demonstration was conducted under "especially poor" weather conditions. <sup>12</sup> Protester Comments at 9-10.

The agency responds that it was reasonable for it to rely on observations that recorded actual performance rather than theoretical performance made under extremely conservative assumptions. Supp. Legal Memorandum at 2. Further, the agency argues that a preference for use of SM&DCD observations was expressed in the RFP, and that the NVTherm data did not incorporate the effects of the [DELETED] enhancement features. <u>Id.</u> Finally, the agency both attacks the reliability of the NVTherm data and asserts that it did, in fact, consider the data. Supp. TET Statement of Facts at 10-12.

<sup>&</sup>lt;sup>10</sup> The SSA states, "I was fully aware that the reason the [DELETED] was also rated an Exceptional Strength in Operational Functionality (1.a) for Elbit was because of its ease of use in detecting [DELETED], not necessarily in the 'quality of the video,' a different reason than Identification Capability (3.b)." Supp. SSA Memorandum at 3. While the SSA states that this reason is listed in the supporting documents, and was explained to him, he makes no citation to the record to support the notion that the strength was based on ease of use, not enhanced image quality.

<sup>&</sup>lt;sup>11</sup> Offerors were required to submit Night Vision Thermal and Image Processing Modeling software ("NVThermIP 2009" or "NVTherm") data with proposals using agency-defined target and environmental parameters. RFP at 110-111; attachment J-2, at 47-75.

<sup>&</sup>lt;sup>12</sup> The agency does not meaningfully respond to Raytheon's arguments challenging the reliability of the SM&DCD observations based on disparate weather conditions. The observation reports seem to provide some support for Raytheon's allegations. <a href="Compare">Compare</a> AR, exh. D6, Raytheon SM&DCD Government Observation Report; exh. D10, EFW SM&DCD Government Observation Report. Additionally, it is at least implied by the record that a reason Raytheon's demonstration occurred under more adverse weather conditions was because of an agency error in scheduling the demonstration. Contracting Officer's Statement at 4.

We do not dispute the agency's preference for relying on observational data. However, we find it unreasonable for the agency to require submission of the NVTherm data and not to consider such data in some measure. While the TET chair now states that the agency considered the data, we have been pointed to no portion of the contemporaneous record that mentions such consideration. Additionally, while we do not think it was inherently improper for the agency to utilize separate teams for the SM&DCD observations, we agree with Raytheon that doing so necessarily meant that the observers had no basis of comparison between the proposed systems. The agency might have buttressed the more subjective observations with the available objective data, such as the NVTherm data, and by taking into consideration different atmospheric conditions, such as weather, but does not appear to have done so.

It is apparent from the record that the EO/IR camera systems are integral parts of both EFW's and Raytheon's offered solutions, being used in conjunction with ground radar to perform the identification and detection functions, respectively. <a href="Compare">Compare</a> AR, exh. E1, Raytheon's FPR, Volume II, at II-2-2; exh. F2, EFW's FPR, Volume II-B, at 1-11. Further, video capabilities to enable operators to identify, classify and provide near real time surveillance of items of interest are specifically detailed as characteristics of a successful system. RFP at 11-13. Finally, each offeror's EO/IR camera system addresses at least one key performance parameter and various lower priority OCI's and FCI's.

Notwithstanding the central importance of this aspect of both offerors' proposals, and the fact that the agency sought to differentiate between the two proposed systems under both the operational utility and technical factors on the basis of image quality, the record is devoid of any reasonable explanation as to why EFW's standard-resolution camera with [DELETED] was assigned a unique strength under the operational utility factor for enhancement to image quality, while Raytheon's high-resolution camera with image enhancement features was not. In addition, while the record shows that Raytheon's high-resolution camera was assigned a unique strength under the technical factor, there is no support in the record for why EFW's [DELETED] feature was also assigned a unique strength for enhancement to image quality given that Raytheon's offered solution was higher resolution and also offered image enhancement features. Most importantly, there is no reasonable explanation in the record why the enhanced digital image capability provided by EFW's [DELETED] feature stands as a discriminator, given that Raytheon offered a higher-resolution camera with image enhancement capabilities.

## Clutter Reduction

Raytheon next challenges the third feature specifically cited by the SSA in his tradeoff decision, "clutter." Specifically, the SSA stated that one of the features of the EFW proposal that enhances its operational mission effectiveness is that it

"effectively reduce[s] the amount of on-screen clutter an agent must absorb. . . ." AR, exh. J1, Source Selection Decision, at 9. Raytheon contends that, while it is unclear whether the SSA is referring to appearance (screen clutter) or the tendency of radar to pick up and track "false" items of interest (radar clutter), the contemporaneous record does not show any substantive difference between the two proposals.

The agency counters that the SSA's reference was intended as a summary description of how the overall effect of EFW's strengths under the operational functionality and graphical interface subfactors was to reduce burdens on operators and make it easier to make the most of the system's potential. Supp. Legal Memorandum at 5. The SSA states that clutter is "anything that appears on the display that the operator would rather not have displayed." Supp. SSA Statement at 2. The SSA explains that when he noted that the Elbit features effectively reduce clutter, he was "highlighting an effect derived from the totality of the specific system characteristics offered by Elbit." Id. As set forth below, we conclude that the agency's explanation is unpersuasive given the contents of the record.

With respect to EFW's proposal, the SSEB's comparative analysis identifies [DELETED] strength under the operational functionality subfactor and [DELETED] strengths under the graphical user interface/ergonomics subfactor of the operational utility factor that might relate to an operator's display. AR, exh. I10, SSEB Comparative Analysis Report, at 125-129. None of these identified strengths or the underlying narrative makes specific reference to clutter reduction. See id.; see also exh. G2, EFW Factor 1 Consensus. Some of the relevant strengths make reference to increased on-screen functionality, such as [DELETED], but it is unclear as to which, if any, of these strengths the SSA might be referring. On the other hand, one of the unique strengths identified in Raytheon's proposal under the graphical user interface/ergonomics subfactor allowed operators to efficiently identify the item of interest and "de-clutter" their screen. AR, exh. J4, SSEB Comparative Analysis Report, at 140.

An agency's evaluation of proposals must reflect a reasonable assessment of each offeror's ability to successfully perform the contract requirements, and the agency's evaluation and source selection decision must be adequately documented. See Savvee Consulting, Inc., supra, at 7. In assessing a discriminator between proposals, the record must reasonably and meaningfully address the basis for such an assessment. Magnum Medical Personnel, A Joint Venture, B-297687.2, June 20, 2006, 2006 CPD ¶ 99. Without a clear record here, we have no basis to find that the SSA reasonably identified "clutter" as a discriminator.

#### Video Motion Detection

Raytheon next argues that the agency unreasonably determined that EFW's videomotion-while-scanning feature was a discriminator between the proposals. The firm argues that the agency failed to recognize that, even if its camera cannot detect motion while moving, its [DELETED] with motion detection "does essentially the same thing." Protester Comments at 25.

One aspect of EFW's proposal discussed by the SSA in his award decision was that EFW's proposed solution allows video motion detection even while a camera is moving. AR, exh. J1, Source Selection Decision, at 9. The SSEB recognized this aspect of EFW's proposal as an outstanding strength under the operational functionality subfactor of the operational utility factor. AR, exh. I10, SSEB Comparative Analysis Report, at 11. The record also shows that Raytheon's proposal was assessed a significant strength under the same subfactor for its proposed [DELETED]/motion detection capability. Id. at 13.

In support of its argument that the agency failed to recognize that the firm's proposed system can detect motion while the camera is moving, Raytheon points to product literature provided in its proposal. Protester Comments at 25. The agency responds that the mere fact that the product literature indicates that a subcomponent has this capability does not establish that the capability is available in Raytheon's offered system. Supp. Legal Memorandum at 4. We agree.

Offerors are responsible for submitting a well-written proposal with adequately-detailed information that allows for a meaningful review by the procuring agency. Hallmark Capital Group, LLC, B-408661.3 et al., Mar. 31, 2014, 2014 CPD ¶ 115 at 9. Raytheon's proposal clearly discusses video motion detection capability as being available when the camera is stopped, and makes no clear mention of such capability being available while the camera is in motion. Further, our review of Raytheon's product literature shows that it does not clearly support the firm's position. However, even if it did, we think the agency could reasonably rely on the offered system capabilities as described in the firm's proposal, rather than on a description in its product literature.

Finally, with respect to whether the agency reasonably determined that EFW's video-motion-while-scanning feature was a discriminator between the two proposals, given that Raytheon's [DELETED] with motion detection "does essentially the same thing," we defer to the agency's considered technical judgment in this regard. See BNL, Inc., B-409450, B-409450.3, May 1, 2014, 2014 CPD ¶ 138 at 7. For example, as the SSA explains, "[t]he fact that a camera can detect and identify in one step, without requiring an [DELETED], is much simpler for Border Patrol agent and offers significant operational value." SSA Statement ¶ 21. We find no basis to question the agency's assessment here.

<sup>&</sup>lt;sup>13</sup> Raytheon's proposal states its "[DELETED]." AR, exh. E1, Raytheon Final Proposal Revision - Volume II, at II-2-14.

## Past Performance

Raytheon argues that, in evaluating EFW's past performance, the agency conflated various members of the Elbit corporate family and improperly credited EFW with the past performance of the firm's parent companies, ESA and Elbit Systems, Ltd. Raytheon asserts this error is prejudicial because EFW likely lacks the relevant past performance that other members of its corporate family possess. The agency counters that it did not credit EFW with the past performance of ESA or Elbit Systems, Ltd., but instead with the past performance of two key subcontractors identified in EFW's past performance proposal--Elbit Systems Land & C4I Ltd. (ESLC) and [DELETED].

For the past performance evaluation, the RFP permitted offerors to submit relevant contracts and subcontracts for acquired companies, divisions, subsidiaries or major subcontractors so long as the information submitted provided a clear understanding of the relevancy of the submitted past performance, the subcontractor or entity's contribution to the overall proposed effort, and how the subcontractor or entity will contribute to the ability to meet the solicitation's requirements. RFP at 121. The RFP stated that the agency was interested in past performance information for entities that will be performing the work required by the solicitation. Id.

EFW submitted information concerning five contracts, three performed by ESLC and two by [DELETED], and identified these firms as "key subcontractors." AR, exh. F4, EFW Volume V – Past Performance, at 1-1 to 1-3. With respect to ESLC, the proposal emphasized the firm's work as the lead system integrator and core technology developer of [DELETED]. <u>Id.</u> at 1-1. EFW's proposal explained that the [DELETED] system is built on software and architecture [DELETED]. <u>Id.</u> The Past Performance Evaluation Team (PPET) evaluated EFW's past performance as "satisfactory" based on an assessment of the two contracts submitted by EFW's subcontractor [DELETED], but appears to have attributed the three contracts performed by ESLC directly to EFW. See generally AR, exh. G-6, EFW Consensus Past Performance Evaluation. Further, other than the above-mentioned reference to ESLC as a key subcontractor in EFW's past performance volume,

<sup>&</sup>lt;sup>14</sup> Past performance could be rated as superior, satisfactory, unsatisfactory or neutral. AR, exh. C1, SSP, at 34.

<sup>&</sup>lt;sup>15</sup> The PPET recognized [DELETED] status as a subcontractor to "Elbit" in evaluating the firm's past performance submissions. AR, exh. G-6, EFW Consensus Past Performance Evaluation, at 7-11. However, in evaluating the three contracts performed by ESLC, the PPET did not draw a similar distinction. <u>Id.</u> at 1-6. In fact, the PPET determined that "the Offeror" has demonstrated its ability to meet site construction, system testing and production requirements, based at least in part on "[i]ts largest project, [DELETED], . . ." Id. at 2.

there is no evidence that ESLC will perform on this contract as a subcontractor. We can only conclude that the agency evaluated ESLC's contracts as EFW's own past performance.

We therefore consider whether the agency properly attributed ESLC's past performance to EFW as an affiliated company. An agency properly may attribute the experience or past performance of a parent or affiliated company to an offeror where the firm's proposal demonstrates that the resources of the parent or affiliate will affect the performance of the offeror. IAP World Servs, Inc.; EMCOR Gov't Servs, B-407917.2 et al., July 10, 2013, 2013 CPD ¶ 171 at 8-9; Perini/Jones, Joint Venture, B-285906, Nov. 1, 2000, 2002 CPD ¶ 68 at 4. The relevant consideration is whether the resources of the parent or affiliated company--its workforce, management, facilities or other resources--will be provided or relied upon for contract performance such that the parent or affiliate will have meaningful involvement in contract performance. Ecompex, Inc., B-292865.4 et al., June 18, 2004, 2004 CPD ¶ 149 at 5. While it is appropriate to consider an affiliate's performance record where the affiliate will be involved in the contract effort, it is inappropriate to consider an affiliate's record where that record does not bear on the likelihood of successful performance by the offeror of the project at issue. National City Bank of Indiana, B-287608.3, Aug. 7, 2002, 2002 CPD ¶ 190 at 10.

The record provides no evidence that ESLC is contributing any resources--whether it be workforce, management, facilities or other resources--to EFW's proposed effort here. At most, it can be concluded from EFW's proposal that ESLC's solution was [DELETED], a fact for which the firm was credited under the technical factor. As a result, the record shows that DHS improperly considered ESLC's contracts as past performance attributable to EFW. See IAP World Servs, Inc.; EMCOR Gov't Servs, supra, at 8-9.

## Conclusion and Prejudice

We conclude that the agency's evaluation was unreasonable in three material respects. First, the record provides no reasonable basis for recognizing as a discriminator EFW's proposed [DELETED] feature on the basis of enhanced image quality. Second, the SSA's conclusion that EFW's proposed solution effectively reduced the amount of on-screen clutter finds no clear support in the record. Finally, the agency's evaluation of EFW's past performance was unreasonable in

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<sup>&</sup>lt;sup>16</sup> EFW's proposal identifies ESA as a "main subcontractor" for the [DELETED], AR, exh. F4, EFW Volume V - Past Performance, at 1-6, and as "a subcontractor for production of certain components" under one of ESLC's contracts. <u>Id.</u> at 1-9. While the agency might have considered whether ESA was contributing resources to EFW's effort under this procurement, there is no evidence that it did so.

that it attributed to EFW the past performance of ESLC, where there is no evidence that ESLC will have any meaningful involvement in contract performance.

Nonetheless, our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions; that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. Armed Forces Hospitality, LLC, B-298978.2, B-298978.3, Oct. 1, 2009, 2009 CPD ¶ 192 at 9-10; McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3. Our review of the record shows that Raytheon has met its burden of proving a reasonable possibility of prejudice.

The record shows that while receiving the same adjectival rating, EFW was ranked higher than Raytheon under the management factor. AR, exh. J4, Offeror Comparative Analysis Report, at 10. Further, while both offerors received the same adjectival rating under the technical factor, the SSA recognized a slight advantage in Raytheon's proposal. AR, exh. J1, Source Selection Decision, at 9. Finally, while both EFW and Raytheon were rated equally under the SM&DC and past performance factors, AR, Tab I10, SSEB Comparative Analysis Report, at 22-23, 39, Raytheon has successfully shown that the agency's evaluation of EFW's past performance was unreasonable.

While EFW may have an advantage under the operational utility factor, given our findings here, we cannot say with certainty that this will be the case upon reevaluation. Moreover, the SSA's selection decision specifically recognized as discriminators the characteristics of EFW's proposal "that allow video motion detection even while a camera is moving, that enhance digital images so agents can have a better sense of whether an object is more or less likely to be a threat. . . and that effectively reduce the amount of on-screen clutter an agent must absorb." AR, exh. J1, Source Selection Decision, at 9. Consequently, it is reasonable to infer that the SSA highlighted these particular aspects of EFW's proposal as discriminators over Raytheon for a reason, but we cannot say from the SSA's decision what weight he gave these features.

Given these identified errors, and considering Raytheon's more than \$[DELETED] million price advantage, it is possible that a best-value tradeoff decision might differ following a revised evaluation. In such circumstances, we resolve any doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is a sufficient basis for sustaining a protest. See Kellogg, Brown & Root Servs., Inc.-Recon., B-309752.8, Dec. 20, 2007, 2008 CPD ¶ 84 at 5.<sup>17</sup>

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<sup>&</sup>lt;sup>17</sup> Raytheon's argument that DHS unreasonably failed to consider the firm's proposed option year price, submitted in accordance with FAR 52.217-8, as part of the total evaluated price is untimely. The RFP defined total price as the sum total of (continued...)

## RECOMMENDATION

We recommend that the agency reevaluate proposals in a manner consistent with the discussion above and make a new source selection decision based on that reevaluation. Should the agency conclude that a concern other than EFW properly is in line for award, we recommend that the agency terminate the contract awarded to EFW, and make award to the new concern, if otherwise proper. We also recommend that the agency reimburse Raytheon its reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. §21.8(d)(1). The protester's certified claim for costs, detailing the time spent and the cost incurred, must be submitted to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained.

Susan A. Poling General Counsel

<sup>(...</sup>continued)

all base quantity and option quantity CLINs. RFP at 137. The option to extend services clause was not listed as a CLIN. <u>Id.</u> at 2-5, 25-26. To the extent that other language in the RFP is inconsistent with this definition, any resulting ambiguity is patent. Raytheon was required to protest this ambiguity prior to the time set for receipt of proposals but did not do so. 4 C.F.R. § 21.2(a)(1).